HIGH COURT OF UTTARANCHAL AT NAINITAL.

(Chapter VIII Rule 32 (2) (b)
Description of the Case.

Criminal Appeal No. 1987 of 2001

Date of Decision : 28th September, 2005

A.F.R. (Approved for reporting)

~~Not approved for reporting.~~

Date Initial of Judge.

Note : Bench Reader will attach this at the top of first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARANCHAL, AT NAINITAL

CRIMINAL APPEAL NO.1987 OF 2001

Jagdish Singh S/o Shri Jhabban Singh
R/o Mohalla Maheshpura
P.S. Kashipur
District U. S. Nagar .....Appellant

Versus

State of Uttaranchal .....Respondent

Date :- 28th September, 2005

Mr. J. S. Virk learned counsel for the appellant
Sri G. S. Sandhu learned A.G.A.

Hon'ble J.C.S.Rawat, J.

1. This is a criminal appeal against the judgment and order dated 07.03.2001 passed the Sessions Judge, Nainital in S.T. No.495/1997 State Vs. Jagdish Singh and four others u/s 363, 366, 376 I.P.C., whereby the appellant was convicted under section 376 I.P.C. and sentenced to undergo R.I. for a period of four years. However, all the co-accused were acquitted from the charges levelled against them whereas the appellant was acquitted from the charge under section 363 & 366 I.P.C.

2. Brief facts of the prosecution case are that the accused Sudhir @ Papu, Karan Singh, Smt. Omwati Jaswant Singh and Jagdish Singh-appellant kidnapped Km. Vinesh, daughter of Nathia Devi on 24.05.1996 at 2:00 P.M. and the accused had taken Km. Vinesh with them. Nathia Devi went to Sambhal and Gajrola for several times at the residence of Omwati to take her daughter back but the accused did not return her daughter on the pretext or the other. On 06.06.1996 Smt. Nathia Devi went to Gajroal hospital, where the accused Omwati was working, for taking her daughter

back but Omwati denied to give her. Nathia Devi did not lodge any report on the assurance given by the accused till 06.06.1996. Thereafter, on 07.06.1996 Smt. Nathia Devi lodged the report (Ex.Ka.1) at Police Station Kashipur. The Head Moharrier Jagdish Chandra on the basis of the written F.I.R. prepared Chick F.I.R. (Ex.Ka.6). A case was registered under Section 363/366 I.P.C at Police Station, Kashipur against the accused vide G.D. Ex. Ka.7. Dr. Lily Joshi, Government Hospital, Kashipur medically examined Km. Vinesh-victim and found that the girl was habitual to sexual intercourse. Dr. Lily Joshi referred the victim for X-ray in order to determine the age and Dr. L.D. Bhatt conducted the X-ray (Ex.K5) and observed as under :

1. X-ray (R1) elbow joint AP View show fusion of all epiphyss and the elbow joint.
2. X-ray (R1) wrist joint AP view show No fission of radius and ulna.

On the basis of examination of the girl, Dr. J.P. Joshi observed that the age of the girl was about 16-18 years.

3. The investigation was taken up as usual which culminated into the submission of the chargesheet. After submission of chargesheet the accused were committed to the Court of Sessions for trial and the trial court on 11.11.1999 framed charges under section 363, 366, I.P.C. against the accused persons. However, the appellant was also charged under section 376 I.P.C. The accused persons denied charges levelled against them and claimed the trial.

4. The prosecution in order to support its case, produced Nathia Devi (P.W.1), who is the mother of the victim. Km. Vinesh (P.W.2) is the victim. Dr. Lily Joshi-Doctor (P.W.3) was the medical officer and Mohd. Haniff Khan-S.I. (P.W.4) was the investigating officer.

5. In the statement recorded u/s 313 Cr.P.C. the accused persons denied the prosecution case and stated that they have been falsely implicated in this case.

6. The learned trial court after appraisal of the evidence on record, the appellant was convicted under section 376 I.P.C. and sentenced to undergo R.I. for a period of four years. However, all the co-accused were acquitted from the charges levelled against them whereas the appellant was also acquitted from the charges under section 363 & 366 I.P.C. The present appeal has been preferred by the appellant-Jagdish Singh.

7. I have heard the learned counsel for the parties and perused the evidence on record.

8. The prosecution has produced the evidence of Smt. Nathiya Devi (PW1), who is the mother of the victim. PW1 has narrated the prosecution case as stated above. The prosecution has also produced Vinesh-victim (PW-2), who has stated that she was taken from her house by the accused persons without her consent. She has narrated the entire incident that she was taken to Gajrola where she stayed in the night and thereafter she was taken to Haridwar. Jagdish Singh-appellant used to pull the rickshaw at Haridwar.

Then, the accused persons took her to Moradabad where the appellant had sexual intercourse with her. The appellant used to lick her inside the room and he used to pull rickshaw at Moradabad during the day hours. After a lapse of two months, she was recovered by the police from Hariyawala village from the possession of the appellant. Thereafter, she was given to the sufardagi of her mother and she was sent for medical examination.

9. The prosecution has produced the evidence of Dr. Lili Joshi, who had medically examined the victim. She has stated that there was no injury on the person of the victim at the time of medical examination. The victim was found habitual to sexual intercourse and she was referred to the radiologist in order to determine the age of the victim. According to the radiologist examination, she was between 16 to 18 years of age at the time of incident. The doctor has also proved its report Ex.ka.3 to 4. The prosecution has adduced the evidence of Mohd. Hanif Khan (PW4), who conducted the investigation.

10. It is pertinent to mention here that it is a well settled position of law if the evidence of the victim is found reliable it does not required any corroboration on the material points. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands on a higher pedestal than an injured witness. If the court comes to the conclusion that the evidence of the victim is cogent and credible it does not need any further

corroboration by any other independent evidence. Now, I would like to analyze the evidence of PW-2-victim. The learned Sessions Judge has held that the victim was a consenting party for sexual intercourse and the learned Sessions Judge did not find the testimony of the victim reliable on that point. The learned Sessions Judge further acquitted the co-accused from the charges levelled against them. The trial court has held that the evidence of victim is unreliable against the co-accused. In the light of the above facts, the evidence of victim is to be scrutinized.

11. The learned counsel for the appellant contended that the prosecution has taken a specific stand in the first information report that the victim was taken by the accused against her will and her mother has lodged the report to that effect. The learned counsel for the appellant pointed out that during the cross examination the victim has stated in her evidence that she went with the appellant with her own consent. If she had gone with her consent then the case of the prosecution does not stand reliable. The learned A.G.A. refuted the contention. Perusal of the record reveals that the victim has categorically stated in her cross examination that she went with the appellant with her own consent. Meaning thereby, she was not taken against her will.

12. The learned counsel for the appellant pointed out that the prosecution has taken a specific case that the victim was recovered from the custody of the appellant on 25.7.1996, but the I.O. had not prepared the recovery memo. It was further pointed out that the I.O. has tried to explain that due to mistake that said ‘furd’ was not prepared by him. The learned A.G.A.

refuted the contention and contended that the victim has proved that she was recovered from the custody of the appellant. Therefore, there was no need to prepare the recovery memo of the girl. It was further contended that it is the remissness on the part of the I.O. on which the whole prosecution cannot be doubted. It is a settled position of law that if the ocular testimony is cogent and credible then the lapses on the part of the I.O. cannot be taken into account. In the instant case, the ocular testimony is not reliable and cogent. The I.O. had not prepared the furd recovery memo of the girl. This fact also creates a doubt about the veracity of the prosecution case.

13. The learned counsel for the appellant further contended that the age of the girl was more than 18 years at the time of incident. The learned counsel for the appellant also relied upon the school leaving certificate in which the age of the victim comes to 22 years at the time of incident. But, the learned Sessions Judge has not relied upon the said certificate and held that the school leaving certificate cannot be relied upon if the medical evidence is credible and cogent. The learned counsel for the appellant contended that the victim has stated in her cross examination that she was admitted in the D.L.M. Inter College. The said school was only upto class six, but after 7-8 months she left the school. She also admitted that more than 14 years ago she left the school. Whereas the evidence of PW1 has denied stated that the victim was admitted in the D.L.M. Inter College. Meaning thereby, PW1 has not come before the court below with the clean hands. Whereas the medical evidence is concerned, there may be variation

of two years for assessment of age of the victim. It was pointed out by the learned A.G.A. that the parties are villagers and they do not know the implications of the date of birth and the date of birth had been recorded by them according to their convenience. The learned counsel for the appellant contended that if it was so, PW1 would have stated in her evidence that the victim was admitted in the D.L.M. Inter-Collage and her age was not recorded correctly in the school.

14. In view of the above, the learned Sessions Judge has erred in rejecting the school leaving certificate for assessment of age of the victim. The evidence of PW1 is not reliable on the point that the victim was taken without her consent. PW1 has categorically stated in her cross examination that she was not the eye-witness of the incident. Her children i.e. Manoj and Komal aged about 8 and 9 years respectively stated that the appellant has taken the victim from the house without her consent. Manoj and Komal could have been the best evidence to depose that the victim was taken without her consent. Non-production of these two witnesses also creates a doubt about the prosecution story.

15. The learned counsel for the appellant further pointed out that there is an inordinate delay in lodging the FIR. It was pointed out that the girl was taken on 25.4.1996, but the report was lodged on 07.06.1996. The explanation given in the FIR is that the mother of the girl went to Sambhal and Gajrola for several times at the residence of Omwati to take her daughter back but the accused did not return her daughter on the one pretext or the other. When no heed was paid to the request of the mother of victim, she lodged the report

(Ext.Ka.1) at Police Station Kashipur. The date has not been mentioned as to when the appellant refused to return the girl. The prosecution has tried to explain the delay in lodging the FIR. However, it is very strange that as to how the mother came to know that her daughter and the appellant was staying at Gajrola and Sambhal. If the girl was taken away without her consent it was the natural course of PW1 that she would have reported the matter to the police. Therefore, the explanation submitted by PW1 is not credible. In view of the above, the appellant is entitled to be acquitted from the charge.

16. In view of the above discussion I am of the view that the prosecution has not established the guilt beyond any reasonable doubt against the appellant. I find that the learned trial court has erred in convicting and sentencing the appellant. Hence, the appeal is allowed and the conviction and sentence against the appellant awarded by the Trail Court are set aside.

17. Let the lower court record by sent back to the court concerned.

(J.C.S.RAWAT, J.)

28.09.2005
LSR